No. 97-1802

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

DAVID CONN and CAROL NAJERA,

Petitioners,

vs.

PAUL L. GABBERT,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

(1) Does a prosecutor violate an attorney's rights under the Fourteenth Amendment by causing the attorney to be searched at the time his client is testifying before a grand jury?

(2) If the answer to the first question is "yes," was such a right on the part of the attorney clearly established in March, 1994?

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BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the due process protection of the accused into balance with the rights of the victim and of society.

The people, as well as the defendant, need and deserve vigorous advocacy by their attorneys. While prosecutors must be accountable for abuse of their authority, excessive exposure

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1. Rule 37.6 Statement: This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

   Both parties have given written consent to the filing of this brief.

to litigation would have a chilling effect on their advocacy, to the detriment of the people's interest.

The decision of the Court of Appeals in this case exposes prosecutors to litigation of enormous breadth. A vague constitutional right of all attorneys to practice without "unreasonable" or "undue" interference and to the "highest standards" threatens to make constitutional issues out of routine interactions in the course of criminal cases. The resulting chill on the people's advocates would be contrary to the interests CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

The present case arises from the search of an attorney, the plaintiff in this case, who was representing a witness in a grand jury proceeding. Traci Baker had been a defense witness in the first trial of Lyle and Erik Menendez in Los Angeles. *Gabbert* v. *Conn*, 131 F. 3d 793, 797 (CA9 1997). Defendants David Conn and Carol Najera were prosecutors in that case. After the first trial ended in a hung jury, and before the retrial, Conn served Baker with a subpoena for a letter from Lyle Menendez, which Conn believed instructed Baker to testify falsely. The subpoena also required Baker to testify before the grand jury. *Ibid.* Baker informed a detective she had given the correspondence to Gabbert. *Ibid.*

The events on the day of the grand jury session indicate a considerable degree of confusion.

> "Conn approached Gabbert and asked him if he had brought the 'documents' with him. Conn was referring to the Menendez correspondence, but Gabbert thought Conn was referring to Gabbert's motion to quash and accompanying documents.
>
> "Based on Gabbert's response, Conn decided to obtain a warrant to search Gabbert and directed Detective Zoeller to secure it. Under California law, the search of an attorney or law office must be conducted by a court-appointed special master. In this instance, Elliot Oppenheim ("Oppenheim"), a retired lawyer, was authorized to search Gabbert and his effects." *Id.*, at 798.

The search was conducted in a private room while Baker was testifying. Baker came out of the grand jury room to confer with Gabbert. Gabbert said he could not talk to Baker then. He apparently believed that further questioning of Baker could and would be delayed. See *ibid.* "Baker was able to see Gabbert and believed that they had communicated. She felt that he advised her to assert her Fifth Amendment rights." Pet. for Cert. 6. She then made that assertion, and the prosecutors believed she had in fact conferred with her attorney. *Ibid.*[2]

Following this search there was a second search, 131 F. 3d, at 798, but the issues arising from that search are not pertinent to the questions presented here.

Gabbert filed the present suit in federal court under 42 U. S. C. § 1983.[3] The suit raised Fourth Amendment claims as to the validity of the warrant, the scope of the search, and the conducting of the second search. District Court Order of Sept. 27, 1994, App. to Pet. for Cert. B-10-B-12. His objections to the search interfering with communication with his client, however, were made under the Sixth Amendment and substantive due process, *id.*, at B-14-B-15, B-18-B-19, and not the Fourth Amendment.

The District Court dismissed all the claims against Conn and Najera except the due process claim. *Id.*, at B-21-B-22. Plaintiff moved to amend his complaint to add a pendent state-law claim under Cal. Penal Code § 1524. The District Court

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2. This statement in the Petition for Certiorari is not denied in the Brief in Opposition. See Supreme Court Rule 15.2 (respondent who disputes statement of fact must say so in the Brief in Opposition).

3. Zoeller and Oppenheim were also defendants. The claims against them and the disposition of those claims are not pertinent here and are omitted from this summary.

denied leave to amend, exercising its discretion under 28 U. S. C. § 1367(c). The District Court found that the question of whether section 1524 provides a cause of action "is a novel question of state law." See Order Re: Leave to Amend, Feb. 8, 1995, App. to Pet. for Cert. C-4. The District Court subsequently granted summary judgment for Conn and Najera. App. to Pet. for Cert. E.

The Court of Appeals affirmed dismissal of the Fourth Amendment claim against Najera, but the court reversed as to the Fourth Amendment claim against Conn and the Fourteenth Amendment (*i.e.*, substantive due process) claim against both Conn and Najera. 131 F. 3d, at 806.

Conn and Najera petitioned for certiorari on the due process issues. See Pet. for Cert. i. On October 5, 1998, this Court granted certiorari limited to the questions stated *supra*, at i.

SUMMARY OF ARGUMENT

Notwithstanding the Court of Appeal's statement to the contrary, its holding in this case is anything but "narrow." Its expansion of the Due Process Clause to cover an isolated, nonrecurring "interference" with the practice of a profession opens up litigation of breathtaking scope. This step is contrary to this Court's cautious and restrained approach to due process claims, which has limited such claims in order to limit constitutional litigation to its proper scope and leave the large bulk of disputes to nonconstitutional rules and remedies.

Plaintiff's constitutional claim arises from a search, which he contends was conducted in an unreasonable manner. This is a Fourth Amendment claim. Under *Albright* v. *Oliver*, when a claim is covered by the Fourth Amendment, a due process claim does not lie.

The liberty interest claimed in this case, the right to practice a profession, does not rise to the constitutional level unless the action complained of operates to exclude the plaintiff from the

profession. An isolated, nonrecurring interference, such as the one in the present case, does not reach the constitutional threshold.

To overcome qualified immunity, the right in question must have been clearly established with some specificity. This is a question of law. Further, it must have been apparent at the time that the challenged action violated that right. This is a "mixed question" of law and fact. Neither requirement is met in this case.

ARGUMENT

I. The Ninth Circuit's holding in this case needlessly and excessively expands the scope of the Due Process Clause.

"Our Constitution deals with the large concerns of the governors and the governed, but it does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society." *Daniels* v. *Williams*, 474 U. S. 327, 332 (1986); see also *County of Sacramento* v. *Lewis*, 523 U. S. ___, 140 L. Ed. 2d 1045, 1059, 118 S. Ct. 1708, 1718 (1998). Once again, as in *Daniels*, *Lewis*, and other cases, this Court is asked to expand the Due Process Clause to cover matters already addressed by other rules of law. The invitation should, once again, be declined.

The Ninth Circuit in this case claimed that its holding was "narrow." *Gabbert* v. *Conn*, 131 F. 3d 793, 803 (CA9 1997). However narrowly the court may have stated its final holding, the reasoning leading to that holding opens the door to litigation of breathtaking scope. Along the way, the court held "that Gabbert had the clearly established right to practice law free from undue and unreasonable governmental interference." *Id.*, at 802.

The implications of this holding are staggering. If it stands, every action of government which adversely affects a lawyer's

ability to practice law will now be subject to the scrutiny of the federal courts to determine if it is "undue" or "unreasonable." This scrutiny will be layered on top of other mechanisms, including the state courts' control of practice before them, the state bar's disciplinary mechanism, civil litigation for damages or injunctive relief in state courts, and the accountability of elected prosecutors to the voters. Indeed, nothing in the reasoning of the Ninth Circuit limits this additional scrutiny to the practice of law. It could just as easily be applied to medicine, architecture, psychotherapy, or any other profession or occupation. Are the restrictions on a doctor referring patients to a lab in which he has an interest, see Cal. Bus. & Prof. Code § 650.01(a), "undue" or "unreasonable"? This would be a question of federal constitutional law under the Ninth Circuit's broadly worded principle. It might be an easy question, but it ought not be a federal question at all, and it most certainly ought not be a constitutional question.

The question presented by this case depends on what it means to "deprive any person of . . . liberty . . . without due process of law . . . ." U. S. Const., Amdt. 14, § 1. Due process claims fall into three categories. In a procedural due process case, the state's action would be legal and justified by the facts it has alleged, but the procedure for determining the facts is claimed to be inadequate. In a substantive due process challenge to legislative action, the challenge is made against the rule that establishes the legal consequences of the facts. In these cases, the executive officers are alleged to be violating the Constitution even though their actions are proper, or even mandatory, under statutory law. We will refer to this type of case as "substantive/legislative." The third variety is the substantive due process challenge to the executive action itself. In these cases, the executive action is typically not authorized by state law, and may even violate a statute or common law duty, but the plaintiff alleges that the action also violates the

Constitution. We will refer to this type of case as "substantive/executive."[4]

"[T]he first step [in adjudicating a § 1983 claim] is to identify the exact contours of the underlying right said to have been violated." *County of Sacramento* v. *Lewis*, *supra*, 140 L. Ed. 2d, at 1054, n. 5, 118 S. Ct., at 1714, n. 5. This step necessarily entails classifying the contention as procedural, substantive/legislative, or substantive/executive. The criteria for evaluation of the contention differ, depending on that classification. *Id.*, at 1057, 118 S. Ct., at 1716.

Procedural due process claims typically involve the least infringement upon the separation of powers or the people's right to govern themselves through the democratic process.[5] Where a protected liberty interest is found, the burden on the state generally amounts to merely notice and an opportunity to be heard. See, *e.g.*, *Hewitt* v. *Helms*, 459 U. S. 460, 477 (1983), disapproved in part on other grounds, *Sandin* v. *Conner*, 515 U. S. 472, 483 (1995).

Challenges to the substance of legislation under the Fifth and Fourteenth Amendment Due Process Clauses have involved the most controversial issues and cases, from *Dred Scott* v. *Sandford*, 19 How. (60 U. S.) 393 (1857) to *Roe* v. *Wade*, 410 U. S. 113 (1973) to *Washington* v. *Glucksberg*, 521 U. S. ___, 138 L. Ed. 2d 772, 117 S. Ct. 2258 (1997). The interference with legislative authority and democratic self-government

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4. "Executive" is a convenient shorthand, because almost all cases of this type involve executive branch officers. There are, of course, a few cases of officials of other branches committing these types of violations. See, *e.g.*, *United States* v. *Lanier*, 520 U. S. 259, 261 (1997) (judge committed sexual assaults in chambers).

5. We say "typically" because there are a few cases where courts have been asked to regulate the procedure of a core function of another branch of government. See *Ohio Adult Parole Auth.* v. *Woodard*, 523 U. S. ___, 140 L. Ed. 2d 387, 398-399, 118 S. Ct. 1244, 1251-1252 (1998) (executive clemency); *Nixon* v. *United States*, 506 U. S. 224, 228 (1993) (impeachment). These cases do raise major separation-of-powers issues.

requires that this kind of review be carefully limited to "fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition . . . ." *Glucksberg*, 138 L. Ed. 2d, at 787, 117 S. Ct., at 2268 (citation and internal quotation marks omitted).

Substantive due process challenges to executive action involve claims that the action was " 'arbitrary in the constitutional sense.' " *Lewis*, 140 L. Ed. 2d, at 1057, 117 S. Ct., at 1716 (quoting *Collins* v. *Harker Heights*, 503 U. S. 115, 129 (1992)). "Constitutional sense" means that this kind of claim is reserved for "only the most egregious official conduct." *Ibid.* The purpose here is "to preserve the constitutional proportions of constitutional claims, lest the Constitution be demoted to what we have called a font of tort law." *Id.*, at 1058, n. 8, 117 S. Ct., at 1717, n. 8.

In the present case, the State of California has established, by statute, a "predeprivation" procedure. The procedure for the search of an attorney who is not a suspect is set forth in Cal. Penal Code § 1524(c), (d), and (e). Nothing in the opinion of the Ninth Circuit is based on any claimed inadequacy of this procedure. Hence, this is not a "procedural due process" case. Also, nothing in that opinion is based on any claim of unconstitutionality of a statutory rule of substantive law. Hence, this is not a substantive/legislative due process case.

That leaves the substantive/executive variety of due process claims. The essence of the claim is that, although the search itself was legal and supported by probable cause, the timing and manner of the search violated a "liberty interest" within the protection of the Due Process Clause. The Ninth Circuit panel concluded that "[t]he only apparent reason to have both [the search and the client's grand jury testimony] occur at the same time was the prosecutors' desire to prevent Gabbert from communicating with his client." *Gabbert*, *supra*, 131 F. 3d, at 802. In California, as in most states, misuse of legal process "for a purpose other than that for which the process is designed" is the common-law tort of abuse of process. 5 B. Witkin,

Summary of California Law § 459, p. 547 (9th ed. 1988) (emphasis omitted). The question in this case, as in *Lewis*, *Collins* v. *Harker Heights*, *Albright* v. *Oliver*, 510 U. S. 266 (1994), and other cases, is whether to make a federal constitutional issue out of a tort case.

The Fourteenth Amendment and its implementing legislation, including 42 U. S. C. § 1983, provide important protections for individual rights. The protection of such rights cannot be left entirely to the states "because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies." *Monroe* v. *Pape*, 365 U. S. 167, 180 (1961), overruled in part on other grounds, *Monell* v. *New York City Dept. of Soc. Serv.*, 436 U. S. 658, 663 (1978). Along with benefits, though, this kind of litigation entails substantial costs.

"By extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action." *Glucksberg*, *supra*, 138 L. Ed. 2d, at 787, 117 S. Ct., at 2267-2268. This effect is most severe in the substantive/legislative cases, but it is also present in the substantive/executive cases.

Compensation of persons who have been wronged is an essential part of our system of civil justice, but that system involves many trade-offs and policy judgments. Tort litigation is a burden on society, and we must decide how much of our resources we can afford to devote to it. Even where an act is admittedly wrongful and compensable, there are issues of the extent of compensation, availability of punitive damages, the allowability and amount of attorney's fees, and whether to provide an administrative remedy and require that it be invoked before turning to the courts, to name only a few. If the interest in question is constitutionalized, and thus made subject to a section 1983 action, the state deliberative process is short-circuited and the people lose control of these decisions.

Broad language in some early cases threatened to make the Due Process Clause into an all-encompassing code of government torts. The Ninth Circuit in the present case relied on *Greene* v. *McElroy*, 360 U. S. 474, 492 (1959) for its basic proposition of a constitutional right to practice free of unreasonable governmental interference. *Gabbert*, *supra*, 131 F. 3d, at 800. More recent cases, recognizing the danger, have cut back the scope of due process claims in several ways.

First, due process claims have been held to be precluded when another constitutional provision establishes the standard for the conduct in question. This issue is addressed in part II, *infra*.

Second, procedural due process claims, at least, are precluded when predeprivation process is impractical and the state provides postdeprivation process. In light of the limited grant of certiorari in this case, we will not brief the point that this rule should extend to substantive due process claims as well. It is discussed in our brief in *County of Sacramento* v. *Lewis*, No. 96-1337.[6]

Third, the potentially unlimited scope of "liberty interests" has been cut back by a number of cases holding that the interests asserted did not rise to the threshold of constitutional protection. See, *e.g.*, *Cafeteria Workers* v. *McElroy*, 367 U. S. 886, 895-896 (1961) (loss of security badge and single job); *Board of Regents* v. *Roth*, 408 U. S. 564, 575 (1972) (nonrenewal for job); *Paul* v. *Davis*, 424 U. S. 693, 709 (1976) (reputation alone is not constitutionally protected liberty interest).

As we will discuss further in part III, *infra*, the constitutional threshold for interference with a profession or occupation has, after some initial uncertainty, largely settled at complete exclusion from the field.

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6. This would not be an appropriate case for further exploration of this point, even with a broader grant of certiorari, as the existence and scope of postdeprivation state process is an unresolved question of state law. See *supra*, at 4.

II. Because any claim plaintiff may have is covered by the Fourth Amendment, his due process claim is precluded under *Albright* v. *Oliver*.

Albright v. *Oliver*, 510 U. S. 266 (1994) is strongly analogous to the present case. In that case, as in this one, this Court was asked " 'to break new ground' " in substantive due process. *Id.*, at 281 (Ginsburg, J., concurring). The Court declined to do so, with a majority basing that decision on the conclusion that Albright's claim was covered by the Fourth Amendment. *Id.*, at 273-274 (plurality); *id.*, at 289 (Souter, J., concurring in the judgment) (no substantial injury to plaintiff not attributable to the seizure).

Comparing *Albright* with the present case, we see that Gabbert's claim falls more squarely within the Fourth Amendment realm than Albright's did. In *Albright*, plaintiff was subjected to both a seizure, *i.e.*, arrest followed by release on bail with restrictions, and an ensuing prosecution. *Id.*, at 268-269. His claim of injury from the prosecution itself was sufficient to convince four Justices that a separate due process analysis was required. See *id.*, at 281 (Kennedy, J., concurring in the judgment); *id.*, at 307 (Stevens, J., dissenting). In the present case, there is no further action after the search that even arguably caused injury to the plaintiff.

The Fourth Amendment is not limited to questions of *whether* the government may search and seize; it also includes questions of *how* the government may search and seize. Indeed, *Graham* v. *Connor*, 490 U. S. 386 (1989), the *Albright* plurality's main precedent, was an "excessive force" case. *Id.*, at 390. The issue was not the fact of Connor's investigatory stop of Graham, but rather the amount of force used to effect it. Similarly, in *Wilson* v. *Arkansas*, 514 U. S. 927, 929 (1995) the police had a valid warrant supported by probable cause and thus were authorized to enter and search the home. The issue was the manner of execution of the warrant, specifically "that the officers had failed to 'knock and announce' before entering [defendant's] home." *Id.*, at 930. The Court held that "the

reasonableness of a search of a dwelling may depend in part on whether law enforcement officers announced their presence and authority prior to entering." *Id.*, at 931.

The essence of Gabbert's claim is the time of the search. See *Gabbert* v. *Conn*, 131 F. 3d 793, 802 (CA9 1997). A complaint about the time is similar to a complaint about the manner.[7] The challenge goes not to the fact or extent of the search but the way in which it was conducted. The injury is not the invasion of privacy that inevitably comes from a search but rather some collateral damage that could have been avoided. As in *Graham* and *Wilson*, this kind of complaint goes to Fourth Amendment reasonableness.

Because *Albright* has no majority opinion, its "holding . . . may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . ." *Marks* v. *United States*, 430 U. S. 188, 193 (1977) (quoting *Gregg* v. *Georgia*, 428 U. S. 153, 169, n. 15 (1976) (lead opinion)). "This test is more easily stated than applied" to some cases, *Nichols* v. *United States*, 511 U. S. 738, 745 (1994), because it is not always apparent which opinion is "narrowest." *Albright* fits that description. The difficulties of *Marks* need not be resolved here, though, because the present case fits squarely within the positions of *all* of the opinions concurring in the judgment in *Albright*.

We begin with the plurality. From the fact that Albright's claim fell within the compass of the Fourth Amendment, 510 U. S., at 274, the plurality "hold[s] that substantive due process

7. The triad "time, place, and manner" is, of course, a familiar one in First Amendment law. See, *e.g.*, *Ward* v. *Rock Against Racism*, 491 U. S. 781, 791 (1989). The phrase appears in the text of the Constitution where it authorizes some state regulation of federal elections. U. S. Const., Art. I, § 4.

. . . can afford him no relief." *Id.*, at 275. This holding is "on all fours" with the present case.[8]

Justice Kennedy's opinion agrees with the basic rule as stated by the plurality, but disagrees with its application to the facts of *Albright*. *Id.*, at 281. The facts of the present case, though, are not subject to this disagreement. Unlike *Albright*, there is no further action beyond the search or seizure, and hence the present case comes within the rule as applied in Justice Kennedy's opinion.

Justice Souter would hold that a due process claim fails if the injury results from a seizure, and the plaintiff fails to allege any substantial injury attributable to some act other than the seizure. *Id.*, at 289 (opinion concurring in the judgment). The same principle would logically apply to a search. As there is no injury in this case from anything other than the search, a due process claim is precluded under Justice Souter's rule.

Albright v. *Oliver* is squarely on point and dictates the outcome of this case. Whatever complaint plaintiff Gabbert has about the timing of the search must be made under the Fourth Amendment, and not the "treacherous" field of substantive due process. See *id.*, at 281 (Ginsburg, J., concurring) (quoting *Moore* v. *East Cleveland*, 431 U. S. 494, 502 (1977) (opinion of Powell, J.)).

III. The "liberty interest" in an occupation only rises to constitutional magnitude when a person is completely excluded from the field.

The "liberty interest" supposedly violated in this case is "an individual's right to practice a profession free from undue and unreasonable state interference . . . ." *Gabbert* v. *Conn*, 131

8. The opinions of Justice Scalia and Justice Ginsburg need not be analyzed under *Marks*, since they join the plurality, but both opinions state rules that would preclude the due process claim in the present case. See *id.*, at 275 (Scalia, J., concurring); *id.*, at 281 (Ginsburg, J., concurring).

F. 3d 793, 800-801 (CA9 1997). The conclusion that this is a constitutionally protected interest comes from a statement in *Greene* v. *McElroy*, 360 U. S. 474, 492 (1959), that "the right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference comes within the 'liberty' and 'property' concepts of the Fifth Amendment, [citation] . . . ."

This sweeping statement is problematic in two respects. First, it is bald dictum, completely unnecessary to the holding of the case. The *Greene* Court was merely summarizing the argument of respondent at this point. The case was decided on narrower, nonconstitutional grounds. *Id.*, at 493, 508; *id.*, at 509 (Harlan, J., concurring in the judgment). Second, the statement purports to state established law, but nothing close to its breadth is supported by the cases it cites. As Justice Clark noted in dissent, the majority

> "cites four cases in support of the proposition and says compare four others. As I read those cases not one is in point.[4] In fact, I cannot find a single case in support of the Court's position.

"4. *Dent* v. *West Virginia*, 129 U. S. 114 (1889), held that a West Virginia statute did not deprive one previously practicing medicine of his rights without due process by requiring him to obtain a license under the Act. *Schware* v. *Board of Bar Examiners*, 353 U. S. 232 (1957), likewise a license case, did not pass upon the 'right' or 'privilege' to practice law, merely holding that on the facts the refusal to permit Schware to take the examination was 'invidiously discriminatory.' In *Peters* v. *Hobby*, 349 U. S. 331 (1955), the Court simply held the action taken violated the Executive Order involved. The concurring opinion, DOUGLAS, J., p. 350, went further but alone on the question of 'right.' The Court did not discuss that question, much less pass upon it. *Slochower* v. *Board of Education*, 350 U. S. 551 (1956), held that the summary dismissal without further

> evidence by New York of a school teacher because he had pleaded the Fifth Amendment before a United States Senate Committee violated due process. The case merely touched on the 'right' to plead the Fifth Amendment, not to 'property' rights. *Truax* v. *Raich*, 239 U. S. 33 (1915); *Allgeyer* v. *Louisiana*, 165 U. S. 578 (1897); and *Powell* v. *Pennsylvania*, 127 U. S. 678 (1888), were equal protection cases wherein discrimination was claimed. Greene alleges no discrimination." *Id.*, at 512-513.

The Court did not take long to back off from *Greene*'s sweeping dictum. *Cafeteria Workers* v. *McElroy*, 367 U. S. 886 (1961) involved the revocation of a security badge needed for employment at a particular installation. *Id.*, at 887-888. The Court first decided that the commander's action was authorized, distinguishing *Greene*. *Id.*, at 889-894. The constitutional issue was then presented.

> "What, then, was the private interest affected by Admiral Tyree's action in the present case? It most assuredly was not the right to follow a chosen trade or profession. Cf. *Dent* v. *West Virginia*, 129 U. S. 114; *Schware* v. *Board of Bar Examiners*, 353 U. S. 232; *Truax* v. *Raich*, 239 U. S. 33. Rachel Brawner [the employee] remained entirely free to obtain employment as a short-order cook or to get any other job, either with M & M or with any other employer. All that was denied her was the opportunity to work at one isolated and specific military installation." *Id.*, at 895-896.

While the sweeping dictum of *Greene* is not mentioned by name, this passage cites the same cases as *Greene* and says the right they recognize is *not* implicated. Greene was an aeronautical engineer at a time when defense work permeated the aeronautics industry. See *Greene*, 360 U. S., at 491, n. 21. Hence, the revocation of his security clearance amounted *de facto* to a complete exclusion from his field. *Id.*, at 475-476, 492. Brawner, the real party in interest in *Cafeteria Workers*, was only precluded from one job and could still seek employment in the vast majority of positions in her field. *Cafeteria*

Workers thus sharply narrowed the *Greene* dictum from *interference* with a trade or profession down to *exclusion* from a trade or profession.

The distinction between interference and preclusion was reaffirmed in *Board of Regents* v. *Roth*, 408 U. S. 564 (1972). Roth, a nontenured college professor, was not rehired for the following academic year. *Id.*, at 566. Beyond question, being fired is a far greater "interference" with one's occupation than the isolated, one-time action in the present case. Yet *Roth* held that discharge did not deprive Roth of "liberty" within the meaning of the Due Process Clause. The Court noted that the state action did not "foreclose[] his freedom to take advantage of other employment opportunities." *Id.*, at 573. The Court distinguished *Schware* v. *Board of Bar Examiners*, 353 U. S. 232, 238 (1957), a case of complete exclusion from a profession. Citing the passage of *Cafeteria Workers* quoted above, *Roth* concluded, "It stretches the concept too far to suggest that a person is deprived of 'liberty' when he simply is not rehired in one job but remains as free as before to seek another." 408 U. S., at 575.

The Ninth Circuit has repeatedly recognized complete exclusion from the field as the threshold of a constitutional liberty interest in cases of employment and business. In *Dorfmont* v. *Brown*, 913 F. 2d 1399, 1404 (CA9 1990), the Ninth Circuit rejected a due process attack on the revocation of a security clearance. The court noted that Dorfmont was not excluded from all jobs, but only some of them. *Id.*, at 1403. Loss of a security clearance is a major occupational blow to anyone working in the defense industry, but because it did not rise to level of complete exclusion, it did not amount to deprivation of a cognizable liberty interest. To the same effect is *Erickson* v. *Pierce County*, 960 F. 2d 801 (CA9 1992), a case of discharge plus damage to reputation. *Id.*, at 802-803. "Since Erickson was free to continue in her career elsewhere as an administrative secretary, and since she was not stigmatized to the point where she could not find work, the district court properly dismissed her due process claim." *Id.*, at 806. In

Wedges/Ledges of Calif. v. *City of Phoenix*, 24 F. 3d 56, 65 (CA9 1994), the court found no liberty interest involved when a city prohibited one aspect of plaintiffs' business but did not prevent them from pursuing the occupation altogether. In *Portman* v. *County of Santa Clara*, 995 F. 2d 898, 908 (CA9 1993), a due process claim by a fired government attorney was rejected with the observation he had not been excluded from the practice of law and did, in fact, find other employment as an attorney.

Other circuits recognize the same distinction. *Setliff* v. *Memorial Hosp. of Sheridan County*, 850 F. 2d 1384 (CA10 1988) held, " 'A liberty interest is not implicated where the charges merely result in reduced economic returns and diminished prestige, *but not permanent exclusion from* or protracted interruption of employment.' " *Id.*, at 1397 (emphasis added) (quoting *Munson* v. *Friske*, 754 F. 2d 683, 693 (CA7 1985)). See also *Joelson* v. *United States*, 86 F. 3d 1413, 1420 (CA6 1996) ("effectively forecloses," citing *Roth*); *Bernard* v. *United Township High Sch. Dist. No. 30*, 5 F. 3d 1090, 1092 (CA7 1993) (exclusion from "one particular job" not actionable as violation of liberty interest in following a chosen occupation); *Piecknick* v. *Pennsylvania*, 36 F. 3d 1250, 1259 (CA3 1994) (following *Bernard*); *O'Donnell* v. *Barry*, 148 F. 3d 1126, 1141-1142 (CA DC 1998) (job action that set back plaintiff in his career, but did not destroy it, insufficient to implicate constitutional liberty interest).

There are a few cases involving simultaneous discharge and defamation that muddy the waters somewhat. *Paul* v. *Davis*, 424 U. S. 693, 709, 712 (1976) held that defamation alone does not implicate a liberty interest. Defamation of a fired employee also does not, if it is not "uttered incident to the termination . . . ." *Siegert* v. *Gilley*, 500 U. S. 226, 234 (1991). However, a footnote in *Owen* v. *City of Independence*, 445 U. S. 622, 633-634, n. 13 (1980) finds a liberty interest implicated in a discharge plus defamation case, with no indication that the magnitude of the stigma completely precluded employment in the field. The question of whether two interests can add up to

a constitutional "liberty interest" when neither does alone need not be confronted in the present case, however, since the question before the Court is whether interference with practice of a profession alone rises to that level.

The complete exclusion standard provides a clear, workable line to separate egregious cases warranting constitutional protection from the vast ocean of real and imagined injuries that may warrant adjudication but do not rise to the constitutional level. A lesser standard would threaten to make federal civil rights litigation a forum for second-guessing every government decision from employee firings, such as *Roth*, *supra*, to tow-truck contracting, such as *Piecknick*, *supra*. The Constitution and the civil rights laws should not be "demoted," see *supra*, at 8, and diluted in that manner. Interferences with occupations that do not amount to exclusion from the field can and should be left to state law.

IV. At the time of defendants' actions, it was not "apparent" that the actions violated any "clearly established" due process right.

To decide a legal question, a court must perform "three distinct functions: law declaration, fact identification, and law application." See Monaghan, Constitutional Fact Review, 85 Colum. L. Rev. 229, 234 (1985). That is, a court must decide what rule of law applies to the case, find the facts relevant to the rule, and apply the facts to the rule to reach the conclusion. Stated another way, courts decide questions of law, questions of fact, and "mixed questions."[9]

The qualified immunity cases implicitly recognize that executive officers must go through the same process in deciding

9. These categories are typically distinguished in discussions of the standard of review on appeal or habeas corpus. See Scheidegger, Habeas Corpus, Relitigation, and the Legislative Power, 98 Colum. L. Rev. 888, 903-906 (1998).

whether to take an action that would arguably violate someone's rights. That is, they must decide whether the purported right exists, determine the relevant facts, and decide whether the contemplated action would violate the right. To stay within the umbrella of qualified immunity, officials must be reasonable, not necessarily correct in hindsight, at each step.

As to the facts, *Anderson* v. *Creighton*, 483 U. S. 635, 641 (1987) makes clear that the officers' actions are judged by the information they possessed at the time of the challenged act. Facts discovered later may well negate the legal basis for action, *e.g.*, refute probable cause for a search, but will not defeat immunity.

The controlling rule of law must be identified with some degree of specificity. The broad, abstract phrases of the Constitution itself, such as "due process of law" or "unreasonable searches and seizures" are not sufficient as "clearly established" rules to achieve the policy objectives of the immunity doctrine. "Plaintiffs would be able to convert the rule of qualified immunity that our cases plainly establish into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights." *Id.*, at 639. The policy is to preserve the remedy in the most egregious cases, while protecting society from the social costs of excessive litigation against officials.

> "These social costs include the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office. Finally there is the danger that fear of being sued will 'dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.' " *Harlow* v. *Fitzgerald*, 457 U. S. 800, 814 (1982).

At the law declaration stage, the *Anderson* requirement of specificity is largely the same as the requirement in habeas corpus that the rule asserted was dictated by precedent existing when the state decision became final. See *Sawyer* v. *Smith*, 497 U. S. 227, 236 (1990) (quoting *Anderson*). For example, in

Davis v. *Scherer*, 468 U. S. 183 (1984) a fired government employee claimed that an informal opportunity to be heard, which he had received, and a posttermination evidentiary hearing, which state law provided, were insufficient for procedural due process. He also claimed a right to either a formal pretermination hearing or a *prompt* posttermination hearing. *Id.*, at 187. While the general rule of due process was clearly established, the specific rule the plaintiff claimed was not, and the defendant was covered by qualified immunity. *Id.*, at 191-193.

Specificity of the controlling rule only goes so far, though. Some rules, by their nature, defy crystallization into specific subrules. "Probable cause" is one such rule. *Illinois* v. *Gates*, 462 U. S. 213, 232 (1983). Sufficiency of the evidence is another. *Wright* v. *West*, 505 U. S. 277, 308-309 (1992) (Kennedy, J., concurring in the judgment). Qualified immunity extends beyond declaration of the controlling rule into application of the rule to the facts. In a "probable cause" case, the searching officers are immune if they "reasonably but mistakenly conclude that probable cause is present . . . ." *Anderson*, 483 U. S., at 641; see *Hunter* v. *Bryant*, 502 U. S. 224, 228-229 (1991) (*per curiam*). Probable cause is a mixed question of law and fact. *Ornelas* v. *United States*, 517 U. S. 690, 696-697 (1996).[10]

Finally, the rule of qualified immunity is right-specific. "The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates *that* right." *Anderson*, 483 U. S., at 640 (emphasis added). Violation of some other rule of law does not defeat immunity. *Davis*, *supra*, 468 U. S., at 194 and n. 12.

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10. At this point, the law of qualified immunity diverges from pre-AEDPA habeas law. See, *e.g.*, *Thompson* v. *Keohane*, 516 U. S. 99, 110 (1995) (*de novo* determination of mixed questions). Congress has now acted to limit *de novo* relitigation of mixed questions. See Scheidegger, *supra*, 98 Colum. L. Rev., at 948-953.

In the present case, plaintiff's due process claim is precluded by qualified immunity. The right to practice a profession without reasonable interference is far too general to pass muster as the controlling rule under *Anderson*. As we survey the legal landscape[11] in search of a more specific rule, we find the many cases cited in part III, *supra*, holding that a single "interference" with an occupation does not rise to the level of a constitutional deprivation. While a court might hold, on a plenary consideration of the matter, that those cases are somehow distinguishable, the contrary view is also entirely plausible.

Even if a clearly established rule of adequate specificity could be found here, the question would remain whether it was *apparent* that Conn and Najera's actions violated that rule, based on the facts known to them at the time. The more generally the rule is stated, the greater the difficulty in finding a violation "apparent." Even very general rules can be obviously violated by highly egregious conduct, and this is so even when there are no precedents. See *United States* v. *Lanier*, 520 U. S. 259, 271 (1997) (noting that "selling foster children into slavery" would clearly violate the law despite the lack of a precedent).

The further we get from egregious misconduct and the closer we get to actions that may be considered valid, vigorous performance of public duty, the more important the specificity of the rule becomes. The rule that a warrant is required to enter a person's home to arrest him, see *Payton* v. *New York*, 445 U. S. 573, 590 (1980), for example, is a "bright line" rule for which violations will generally be "apparent." At the other end of the spectrum is "probable cause," where the lack of specific rules would require an aggravated case to conclude that the officers had been unreasonable in their belief probable cause was present. See, *e.g.*, *Hunter* v. *Bryant*, *supra*, 502 U. S., at

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11. This phrase is borrowed from the *Teague* line of cases. See *Graham* v. *Collins*, 506 U. S. 461, 468 (1993).

228-229 (finding immunity on thin evidence); cf. *id.*, at 234 (Stevens, J., dissenting).

If the Ninth Circuit's broad rule of liberty to pursue an occupation free of unreasonable or undue interference is accepted as the controlling rule, it would take a truly egregious act before a violation was "apparent." Whether a challenged action is reasonable or unreasonable in its context is such an inherently nebulous question that it will generally be debatable. If the underlying question is debatable, the immunity debate is over.

In the present case, the prosecutors engaged in some "hardball" tactics, to be sure. Yet they believed that a witness was attempting to conceal relevant evidence in the prosecution of an exceptionally heinous double murder. They had reason to believe that the timing of the search did not, in fact, prevent Gabbert from advising his client. See *supra*, at 3. Whether their actions were reasonable is debatable. That they could reasonably have believed they were reasonable is clear.

CONCLUSION

The decision of the Court of Appeals for the Ninth Circuit should be reversed.

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Respectfully submitted,

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